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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE GRANT, Defendant and Appellant.	H033151 (Santa Clara County Super. Ct. No. CC764027)

Defendant was convicted by jury trial of eight counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)), and the trial court found true allegations that defendant had suffered three prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and served prison terms for four prior felony convictions (Pen. Code, § 667.5, subd. (b)). He was committed to state prison to serve an indeterminate term of 200 years to life consecutive to a determinate term of 32 years. On appeal, his sole contention is that his mistrial motion should have been granted after a prospective juror made remarks in the presence of the sworn jury about defendant's possible involvement in a prior offense. We conclude that the trial court did not abuse its discretion or violate defendant's Sixth Amendment rights in denying his mistrial motion. We therefore affirm the judgment.

I. Background

Defendant was charged by information with nine counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)), and it was further alleged that he had suffered four prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and served prison terms for four prior felony convictions (Pen. Code, § 667.5, subd. (b)). All of the charged offenses were based on thefts of laptop computers from offices between October 2006 and February 2007. The prior conviction and prison prior allegations were bifurcated at defendant's request, and defendant waived his right to a jury trial on those allegations.

The prosecutor made an in limine motion seeking the admission of Evidence Code section 1101, subdivision (b) evidence of defendant's prior similar offenses to show intent, identity, and common scheme or plan. The proffered evidence was that defendant had entered offices in 2001 and 2004 and stolen or tried to steal laptop computers. Defendant opposed this motion. Before jury selection began, the trial court granted the prosecutor's motion.

At the beginning of the jury selection process, the court informed the prospective jurors of the nature of the charged offenses. "[T]he district attorney is alleging that Mr. Grant here on, let's see, on the dates that extend between October of '06 and February of '07, that he entered certain businesses here in Santa Clara County and he stole laptop computers each time." Jury selection consumed one entire day. By 4:30 p.m. that day, the trial jury had been sworn, but voir dire continued for the selection of alternate jurors.

One of the prospective jurors who was being considered as an alternate juror was Prospective Juror 55. When the court called upon him, he made the following statement. "Good afternoon. I'm chairman and CEO of a software company. Married. My spouse is an executive assistant. Three grown children. I've been living in San Jose for the past ten years. [¶] The software we do is directly applicable to law enforcement work. I work regularly with the Justice Department, National Security Agency, Homeland Security, FBI relative to finding bad guys. And it's highly classified. That's about as

much as I can say about it. One of our board members is, in fact, was formally [*sic*] number 2 in the New York City police department headed up to Virginia State Police and until recently was the head of the police department in Virginia. I work quite closely with him on a regular basis. [¶] I was on a criminal case five years ago. We reached a verdict. Our family has been victimized with a house burglarized in early 2007. *We had exactly the same crime happen at our office that this case is about and, unfortunately, Mr. Grant looks an awful lot like the person who I would have identified as having committed that crime in our office*." (Italics added.)

The trial court proceeded to question Prospective Juror 55 and confirmed that the office theft had occurred at his corporate offices during "the first quarter of 2007 in Palo Alto." "THE COURT: You made a comment about identifying the perpetrator or a suspect. Do I take it you were present or you think that maybe you saw someone involved? [¶] Prospective Juror 55: They did a casing of our office first before the crime literally occurred. I encountered the person. He was walking through. I questioned about what they were doing, at which time they left. But then I believe they returned again shortly thereafter." Prospective Juror 55 also told the court that the theft had been reported to the police, but no one had ever been apprehended. The court then asked the attorneys if they objected to the excusal of Prospective Juror 55, and neither objected. Voir dire continued, and the alternates were sworn at about 5:00 p.m.

The next morning, the trial court held a hearing outside the jury's presence after acknowledging that defendant's trial counsel wished to make a motion. The court made the following statement: "Counsel, towards the end of our long jury selection day we did have a gentleman in the juror number 16 spot, [Prospective Juror 55], the court's recollection of the voir dire of [Prospective Juror 55], he indicated he was an executive, a C.E.O. at a software firm. He indicated to us that their firm had been the victim of exactly, basically what we have here, laptop thefts from the corporate headquarters. And then he did make an unfortunate statement, and I don't know exactly what it was, but it

was to the extent that he was saying something about the fact that if he had to identify the perpetrator he looked a lot like Mr. Grant and he pointed to Mr. Grant. As far as I was concerned at that point he was not going to remain, I doubt if he was going to remain in any event. But shortly thereafter, Mr. Dawson [defendant's trial counsel], at the bench indicated that based on that you did want to address the court and make a record of your feelings about that."

Defendant's trial counsel then moved for mistrial on the ground that Prospective Juror 55's remarks "tainted the entire jury panel." "I think all that is just so difficult to untaint from the jury and I think if we own [*sic*] said anything about it further to the jury I think it only brings it up and I think we should declare a mistrial." The prosecutor contended that defendant's trial counsel was mischaracterizing the remarks. "I don't believe that the comments were made with such a venom of identification. I think when [Prospective Juror 55] was explaining he made a very off-handed comment like, well, the defendant looks like somebody that I would have identify [*sic*]. . . . I don't remember it being a pointing and an identification of that nature. [¶] Also, none of these businesses are in Palo Alto. None of these businesses are in the North Bay Area of our county."

The court denied the mistrial motion. "I will acknowledge that it was an inappropriate statement to make. I believe we were towards the end. I don't know -- I really can't say what type of impact it had on the other jurors, but it was a brief statement. I kind of jumped in there right after that and I indicated what I hear you're saying is you can't be fair and he said yes and he was gone. [¶] Counsel, I'm somewhat ambivalent about how to handle that with the jury. My inclination would be to address them this morning and indicate that yesterday there was an inappropriate statement, it was not true, it's not evidence, don't consider it. [¶] However, this [is] your motion and you just indicated that to bring this up again might be more prejudicial than it would be curative, so if you have a suggestion, but I think that to the extent there was any impact on the jury, I should again reassure them that it's an untrue statement, it's not evidence, it's not

to be considered and admonish them not to do so. I think that's probably an appropriate way to go." Defendant's trial counsel agreed that "that's probably the only way to handle it."

Once the jury arrived, the court gave some preliminary instructions. These preliminary instructions included the following: "You must decide what the facts are in this case. You must use only the evidence that was presented in the courtroom. Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." After giving these preliminary instructions, the court made the following statement to the jury. "Now, folks, one more thing before I turn it over to the attorneys. There was an incident that occurred yesterday during the jury selection toward the end of the day, there was a gentleman in the front row who indicated that he was the C.E.O. of a software company. That their company had suffered a burglary similar to what was described yesterday. And then he made a very unfortunate and inappropriate comment to the affect [*sic*] that if he was to identify the perpetrator it looked like the defendant in this case. Again, inappropriate. Completely unfounded as far as we know. I don't want you to -- if you didn't hear it, I'm sorry I brought it up. But I think it's important. [¶] Two things about that. Number one, to our knowledge there's actually no basis in fact to that allegation. But most important for you as jurors, it's not evidence. It's not something that you should consider. In fact, I'm going to order you to completely disregard it. Not discuss it. And not consider it for any purpose because it wasn't evidence in this case. [¶] Does anybody have a question about that or a problem with that? Okay I would appreciate that."

Trial commenced immediately with opening statements and continued for six days before deliberations began. The defense at trial was misidentification. At the conclusion of the trial, the jury was instructed: "You must decide what the facts are. It is up to you and you alone to decide what happened based only on the evidence that was presented during the trial." "You must decide what the facts are in this case. You must use only

the evidence that was presented in the courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." The jury was instructed that it could use the evidence of defendant's 2001 and 2004 offenses to show intent, identity, and plan or scheme.

While the jury was deliberating, defendant's trial counsel renewed his mistrial motion. "[T]he reason I want to put it on the record is just to renew that for a possible appeal, but also just to renew it and let the court know that in this circumstance we ended up having four people come into court and identify Mr. Grant who had not done so before. I think it was a shock to everybody, and four people came in and identified him. And although given the fact that we had that happen and we did not expect that, all the more reason that I think what that potential juror did was to taint the rest of the potential jury pool and then ultimately the twelve who are sitting on the jury." The court did not grant the renewed motion.

Following more than a day and a half of deliberations, the jury found defendant guilty of eight of the nine counts and deadlocked on the remaining count. The strike prior and prison prior allegations were tried to the court. The prosecutor sought dismissal of one of the strike prior allegations. The court granted the prosecutor's request and found the remaining allegations true. The court denied defendant's request that it strike the strike priors. It imposed a state prison term of 200 years to life consecutive to 32 years. Defendant filed a timely notice of appeal.

II. Analysis

Defendant contends that the denial of his mistrial motion was an abuse of discretion and violated his federal constitutional rights to due process, to confront witnesses, and to a fair trial before impartial jurors. Although he did not raise any constitutional claims below, he asserts that he is nevertheless permitted to raise them on appeal, and we assume as much.

Defendant claims that we should apply the standard of review that applies to a denial of a new trial motion based on juror misconduct. The Attorney General disagrees and contends that we should apply the standard of review that applies to a motion to discharge the venire. Both parties are incorrect. Prospective Juror 55 was not a sworn juror, as he was excused, so his comments were not "juror misconduct."[1] Therefore, we reject defendant's claim that we should analyze this issue under the standard of review for new trial motions based on juror misconduct. The Attorney General contends that defendant's mistrial motion was "untimely" because the jury had not yet been sworn. He is mistaken. The trial jury was sworn before Prospective Juror 55 made his remarks, which occurred during voir dire of prospective alternate jurors, and the alternates were sworn a short time after those remarks on that same afternoon. Defendant's mistrial motion was not made until the following morning. Since both the trial jury and the alternates had been sworn at the time of defendant's motion, defendant's motion was properly a mistrial motion rather than a motion to dismiss the venire. Hence, we review the trial court's ruling on this motion under the usual standard of review for the denial of a mistrial motion.

Defendant argues that heightened scrutiny is required because the remarks of Prospective Juror 55 violated his Sixth Amendment rights to confront and cross-examine Prospective Juror 55 about his remarks. He relies on two Ninth Circuit Court of Appeals cases to support his claim of a Sixth Amendment violation. In *Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484 (*Jeffries II*), one trial juror informed the other jurors, while they were returning to the jury room, that the defendant was a convicted armed robber. (*Jeffries II*, at p. 1488; *Jeffries v. Blodgett* (W.D. Wash. 1991) 771 F.Supp. 1520, 1538.) The Ninth Circuit found that the juror's comments made the juror a witness against the

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[1] This disposes of defendant's claim that the trial court was required to presume prejudice.

defendant for Sixth Amendment purposes. (*Jeffries II*, at pp. 1490-1491.) In *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608 (*Lawson*), one trial juror told the other jurors during deliberations that the defendant was "'very violent.'" (*Lawson*, at p. 610, fn. 2.) The Ninth Circuit concluded that this misconduct deprived the defendant of his Sixth Amendment rights. (*Lawson*, at p. 612.)

Jeffries II and *Lawson* are readily distinguishable. In both cases, trial jurors made highly prejudicial comments about the defendants outside the presence of the court. Because the trial courts in *Jeffries II* and *Lawson* were unaware that the jurors had made these prejudicial comments, they had no opportunity to effect a cure, and those comments went unrebutted. The defendants' Sixth Amendment rights were violated due to the fact that these comments were left unrebutted. Here, on the other hand, Prospective Juror 55 made his comments in open court, and the trial court not only had the opportunity to effect a cure but did so. The trial court explicitly told the trial jurors that Prospective Juror 55's comments were "inappropriate," "[c]ompletely unfounded," had "no basis in fact," and were "not evidence," and the court ordered the jurors "to completely disregard it" and "not consider it for any purpose because it wasn't evidence in this case." The trial court also inquired of the trial jurors whether they had "a problem with that," and none expressed any difficulty in complying with the trial court's order. Since Prospective Juror 55's comments did not go unrebutted, but were explicitly rebutted by the trial court with a stern admonishment, no Sixth Amendment violation occurred.

"In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068; *People* v. *Wharton* (1991) 53 Cal.3d 522, 565.)

In our view, the assessment of whether an incident was incurably prejudicial is essentially the same whether the jury's exposure was to remarks by a prospective juror regarding a defendant's prior criminality or erroneously introduced evidence at trial of the defendant's prior criminality. "[E]xposing a jury to a defendant's prior criminality presents the *possibility* of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580 (*Harris*), italics added.) "Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court." (*Harris*, at p. 1581.)

"Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis." (*People v. Chatman* (2006) 38 Cal.4th 344, 369-370.) "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) In evaluating whether the trial court abused its discretion in denying the mistrial motion, "[w]e presume the jury followed the court's instructions." (*People v. Avila* (2006) 38 Cal.4th 491, 574.) "It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 (*Allen*).) "The finding of exceptional circumstances depends upon the facts in each case." (*Allen*, at p. 935.)

In sum, when a trial court confronts a mistrial motion based on the jury's exposure to evidence or allegations regarding a defendant's prior criminality, the court must engage in a "nuanced, fact-based analysis" (*People v. Chatman, supra*, 38 Cal.4th at pp. 369-370) of whether the exposure is so "exceptional" (*Allen, supra*, 77 Cal.App.3d at p. 935) that no admonition could possibly remove it (*Allen*, at p. 935), and the defendant's "chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden, supra*, 29 Cal.4th at p. 555.)

The circumstances surrounding Prospective Juror 55's comments do not reflect that the jury's exposure to those comments was so exceptional that it could not be cured by admonition or that defendant's prospects of receiving a fair trial had been irreparably damaged. First, by instructing the jury that Prospective Juror 55's comments were "[c]ompletely unfounded" and had "no basis in fact," the trial court characterized the comments as false. Since it is reasonable to presume that a jury will honor the word of a court over off-hand remarks by a prospective juror, this instruction substantially limited the impact of the comments. Second, the trial court ordered the jury to "completely disregard" the comments and to "not consider [the comments] for any purpose," and it confirmed that the jury had no "problem" in obeying this order.[2] This order and the confirmation that it would be obeyed provided the requisite assurance that the comments would not play any role in the jury's deliberations. Third, while exposure to Prospective Juror 55's comments posed a potential risk of prejudice in the abstract, those comments had to be considered in light of the fact that the trial court had already approved the prosecution's plan to introduce evidence of defendant's prior similar offenses at trial to show identity. Any potential prejudice from the jury's exposure to Prospective Juror 55's comments would be reduced to insignificance in the shadow of this much more powerful evidence of defendant's prior criminality that would be legitimately introduced at trial.

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[2] Defendant contends that we should not defer to the trial court's ruling on the mistrial motion because the trial court failed to assess the prejudice arising from Prospective Juror 55's comments. He predicates this contention on the trial court's statement: "I really can't say what type of impact [the comments] had on the other jurors." Defendant attaches too much significance to this single comment. At the same time that it made that comment, the court also said that it thought an admonition would be "appropriate" "to the extent there was any impact on the jury." We are convinced that the trial court's ruling is entitled to deference because the court properly assessed whether the comments were incurably prejudicial and determined that an admonition would be sufficient to cure any potential prejudice.

Under these circumstances, the trial court could reasonably conclude that Prospective Juror 55's comments were not incurably prejudicial.

Defendant relies heavily on *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630 (*Mach*). In *Mach*, the defendant was charged with molesting an eight-year-old girl. (*Mach*, at p. 631.) During voir dire, a prospective juror who was a social worker made repeated statements to the effect that it had been her experience during three years in her position that children never lied when they reported a sexual assault. (*Mach*, at p. 632.) The trial court did not admonish the prospective jurors to disregard these comments. (*Ibid*.) The defendant's mistrial motion was denied. (*Mach*, at p. 632.) The Ninth Circuit found that the comments violated the defendant's Sixth Amendment right to an impartial jury. (*Mach*, at p. 633.)

Mach provides no support for defendant's contention. Here, unlike in *Mach*, the trial court told the jury that the comments were unfounded, explicitly admonished the jury to disregard them, and confirmed that the jury had no "problem" obeying its admonition. In addition, the comments to which the jury was exposed in *Mach* were not similar to evidence that was legitimately introduced at Mach's trial, while Prospective Juror 55's comments regarding defendant's prior criminality were insignificant in light of the evidence of defendant's prior criminality that was legitimately introduced at trial.

The trial court did not abuse its discretion or violate defendant's Sixth Amendment rights in denying defendant's mistrial motion.

III. Disposition

The judgment is affirmed.

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Mihara, Acting P. J.

WE CONCUR:

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McAdams, J.

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Duffy, J.